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JAMES R. BROWNING, Cle

In the United States Supreme Court

OCTOBER TERM, 1959

NO. 759

WILLIAM M. JOHNSON and
WALTER O'NEAL,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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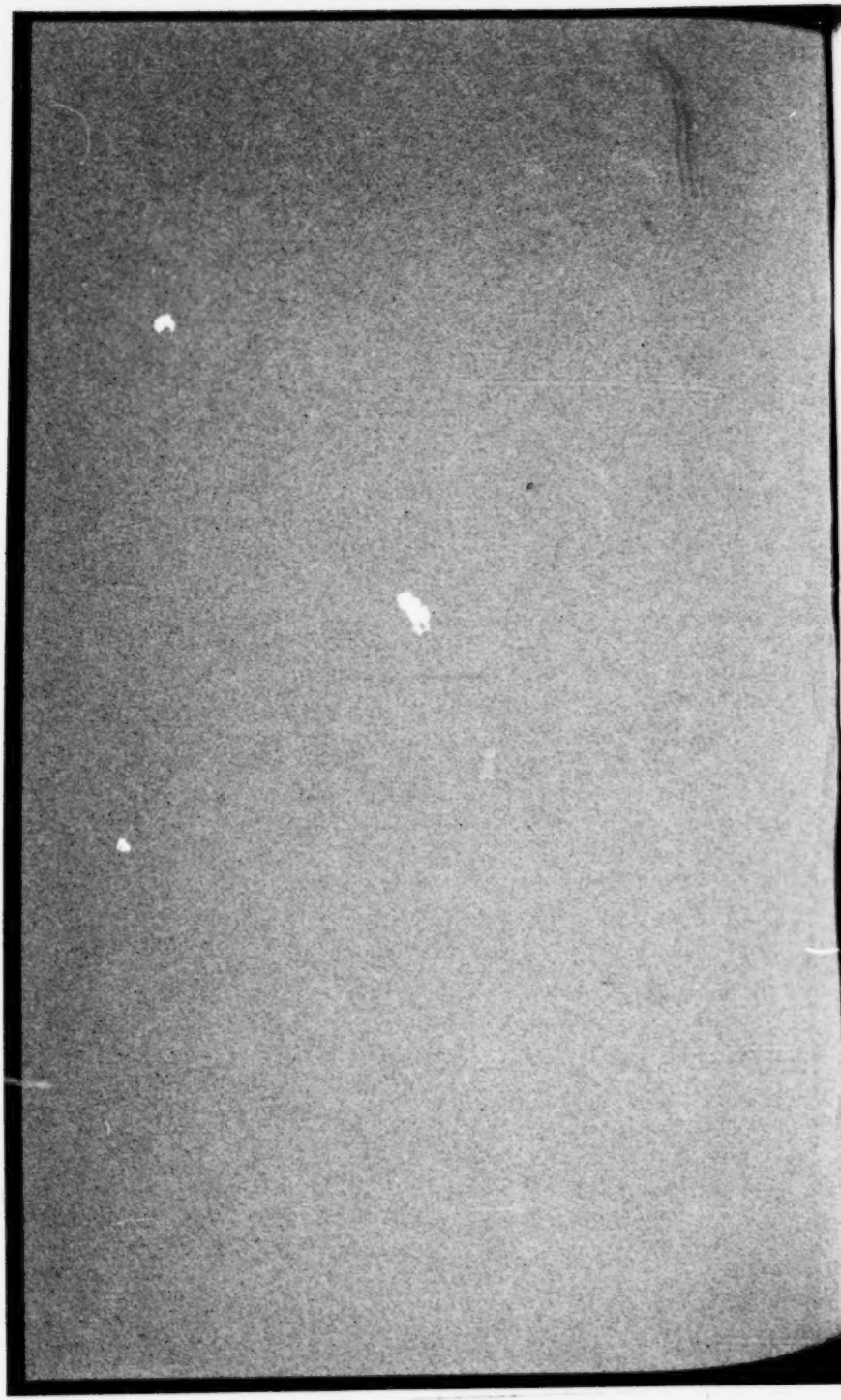

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WILLIAM M. JOHNSON and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Florida, entered February 6, 1959.

OPINION BELOW

The opinion of the Court below entered December 14, 1959 and judgment and order denying rehearing are printed as an appendix to this petition for the convenience of this Court.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code; and Rule 19(1)(b) Revised Rules of the Supreme Court of the United States; Title 28, U.S.C.

The date of the judgment sought to be reviewed and the time of its entry is December 14, 1959.

The date of order denying rehearing by the Court of Appeals for the Fifth Circuit is January 14, 1960.

The Circuit Court of Appeals permitted filing of a second petition for rehearing. This petition was denied on February 24, 1960.

QUESTIONS PRESENTED

1. Where two indictments are consolidated for trial, and the Government's testimony develops a substantial variance between one of the indictments and the proof offered in support thereof, may the Trial Court deny accused's motion for judgment of acquittal on said indictment based on such variance and then proceed indirectly to effect an amendment of such indictment, depriving the accused for moving to strike from the jury's consideration the prejudicial testimony so offered with respect to the remaining indictment?

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2. Does the petitioners' denial of participation in the alleged crime deprive them of the defense of entrapment raised by their plea of not guilty?

3. The propriety and sufficiency of the evidence by the Government to convict petitioner, Johnson, of illegal possession.

STATEMENT OF THE CASE

Petitioners were convicted on a one-count indictment charging possession by them on May 18, 1955 of 125 gallons of distilled spirits in containers to which were not affixed required internal revenue stamps (8).

This indictment, however, was consolidated for trial with another indictment against the petitioners and a third party, one Robert Alvin Branch, charging a single conspiracy by all said parties to possess, remove and conceal distilled spirits, the conspiracy being alleged to have been continuous from April 1, 1955 through and beyond May 18, 1955 (5).

The petitioner, Johnson, moved for severance on the ground the Government intended to offer in evidence in the conspiracy indictment prejudicial statements of his co-defendants which would be inadmissable against him (8-9). The motion was denied (10). The jury returned a verdict of not guilty on the conspiracy indictment and a verdict of guilty of the substantive indictment (257-258).

The evidence upon which petitioners were convicted on the substantive indictment consisted almost exclusively of the testimony of Government agent Spigener. He testified not only about the alleged events of May 18 (the date on which

the indictment charged the substantive offense was committed) but also about the alleged occurrences on May 11 (conspiracy), and in this connection related prejudicial statements by the third party, Branch, made out of the presence of the petitioner Johnson (24).

Mr. Spigener's testimony, when confined to the substantive charge of May 18 alone, was that he, disguised as a moonshine operator, and one Ray Richardson, an informer, contacted Johnson by telephone (we are not told what was said since Richardson, who made the call, did not testify), and later that day these two, together with Beverage Agent Hill, went to Johnson's home. Later O'Neal arrived, then all drove to a place in the country. Then O'Neal left alone and returned sometime later with the whiskey. Johnson was not there, having previously left. Payment was made to O'Neal (27-30). There was no testimony as to where the liquor was stored or by whom, nor any testimony that Johnson ever knew its location. There was no testimony of any relationship between Johnson and O'Neal or that Johnson received any part of the money. Petitioners denied their participation in any of the events of May 18.

That was, in essence, the entire testimony relating to illegal possession by Johnson, but Mr. Spigener's testimony relating to May 11 and the alleged conspiracy was also allowed to go to the jury. This included testimony that Johnson admitted he had 20 jugs of liquor "stashed" near Baldwin and that Branch, who actually made delivery of the liquor and received payment for it, had worked for Johnson some three years.

The Government's testimony on the conspiracy indictment against petitioners and Branch developed a clear and substan-

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tial variance, prompting the trial judge to hold that there was "no connection between the isloated events" of May 11 and May 18 (216). On the accused's motion for judgment of acquittal based on such variance at the close of all testimony, however, the Court denied the same (217), and instead ordered the dismissal of one of the defendant (O'Neal) and struck from the conspiracy indictment the events of May 18. This, in effect, changed this indictment from one charging a single continuing conspiracy beginning May 11 and continuing through May 18, as handed down by the Grand Jury, to one of a single conspiracy between only two of the defendants and involving only the events of May 11.

The Government's testimony showed that the agents had induced the sales made by artifice and wile sufficient to raise the question of entrapment.

The Trial Court in its charges to the jury limited the defense of entrapment to the conspiracy case alone. (206)

REASONS FOR GRANTING THE PETITION

We respectfully submit that the questions involved in this petition warrant a review of this Honorable Court.

The indirect but effective amendment of the conspiracy indictment by, the Trial Court is, we submit, in conflict with applicable decisions of this Court, such as Stirone vs. United States, 80 Sup.Ct. 270. As a result the Government was enabled to place before the jury extraneous and inadmissable matters and an improper and prejudicial climate against the petitioners was created. Had the Trial Court followed such applicable decisions and the extraneous and inadmissable testimony relating to conspiracy stricken, who can say that

the jury would nevertheless have convicted the petitioners on the meager testimony offered on the substantive indictment alone?

Further, the denial of the petitioners' requested charge on entrapment is also, we think, in conflict with applicable decisions of this Court, such as Sherman vs. United States, 356 U.S. 369.

And finally, we submit that an examination of the relevant and properly admissable testimony on the substantive indictment will reveal that there was an insufficient showing to warrant conviction of the petitioner, Johnson, of illegal possession.

All of these matters involve basic and substantial rights of accused persons, and warrant their consideration by this Court.

CONCLUSION

In view of the foregoing the petitioners respectfully pray that this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted.

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M. H. Myerson
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Fred S. Rizk
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I hereby certify that I have served a copy of the foregoing petition for writ of certiorari by mail to John L. Briggs, Asst. U. S. Attorney, Federal Bldg., Jacksonville, Fla., and a copy to the Solicitor General, Dept. of Justice, Washington, 25 D.C. on this 2nd day of March, A. D. 1960.

APPENDIX

JUDGMENT

Extract from the Minutes of December 14, 1959.

WILLIAM M. JOHNSON and WALTER O'NEAL

No. 17655. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE
UNITED STATES COURT APPEALS
FIFTH CIRCUIT

No. 17655.

WILLIAM M. JOHNSON and WALTER O'NEAL,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from United States District Court, Southern District of Florida

---

(December 14, 1959.)

Before HUTCHESON, TUTTLE and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Appellants, William Johnson and Walter O'Neal, were convicted on a one-count indictment for possession on May 18, 1955, of 125 gallons of nontaxpaid distilled spirits. 26 USCA § 5008. They were also indicted, along with Robert Branch, for a conspiracy to carry on the busi-

ness of dealing in spirituous liquors in violation of the law. The two cases were consolidated for trial. At the close of the evidence, the district court required the Government to dismiss either O'Neal or Branch from the conspiracy charge. The Government elected to abandon its conspiracy charge against O'Neal. A verdict of not guilty was returned on the conspiracy charge against Johnson and Branch. A verdict of guilty was returned against Johnson and O'Neal on the substantive charge of unlawful possession. Johnson was sentenced to three years imprisonment and O'Neal to nine months imprisonment. We affirm the judgment below.

I.

Appellant Johnson contends that the evidence was insufficient to show that he was guilty of unlawful possession.

The defendants were convicted largely on the testimony of one William Spigener, a Government agent. He testified to two events, one on May 11 and one on May 18, 1955.

Spigener testified that on May 11 he and an informer, Ray Richardson, met Johnson at Francis' Grill on Highway 90, west of Jacksonville. They asked him if he had any whiskey. Johnson answered, "how much do you want?" They said, "Twenty-five jugs." Johnson said that he did not have twenty-five jugs but he had twenty jugs "stashed" near Baldwin, Florida. They agreed to meet at Johnson's house in Baldwin at two o'clock that afternoon. When they met in

the afternoon Robert Branch was present. He had been working some three years for Johnson. After a short private conversation between Branch and Johnson, Branch got in his car and led Spigener and Richardson, in their car, to a point about five miles north of Baldwin, then turned down a dirt road to a place where he stopped and exchanged his car for the agents' car. Two hours later he returned in the government car along with twenty five-gallon jugs of nontaxpaid whiskey. Spigener paid Branch $200 for the whiskey.

On May 18, in company with Richardson and James Hill, a State Beverage agent, Spigener went to Johnson's home. Earlier in the day, Richardson had telephoned Johnson and had made arrangements to meet him. Johnson arrived in a Chrysler and announced that "the boy" (O'Neal) would be there in a few minutes. O'Neal arrived at about 7:40 P.M., driving a Cadillac. Johnson then said that O'Neal would take the government car and load it. He instructed Spigener, Richardson, and Hill to use his 1957 Ford. This was the same car Branch had used on May 11. There were no license plates on the car. The plates were under the seat, but Johnson was unable to find anything with which to put the license plates on the car. Johnson then said that they would go over in his Cadillac. He led the way. Spigener and the agents followed in the Cadillac. They drove a distance on Highway 90, turned into a dirt road, drove down that road for a mile and a half, turned and drove down another dirt road for about 300 yards, and pulled over to the side of the road and stopped. John-

son exchanged cars again with Spigener and then left in the Cadillac, after stating that "the boy" would be along in a few minutes with the whiskey. O'Neal arrived shortly in the government car. It contained twenty-five five-gallon jugs of nontaxpaid whiskey. Spigener asked the boy if Johnson wanted the payment to be made to him. O'Neil replied "Yes". Spigener then held a light while Hill counted out $250 into O'Neal's hands.

Johnson's defense was that he had not been selling whiskey for six or seven years; his business was selling used cars. Richardson begged Johnson to sell him whiskey (for resale), because he was desperate to make some money to pay doctors' bills and hospital bills for his sick mother. Johnson said that he refused to sell; all he did was to help Richardson out by introducing him to Branch. He denied that he was present or that he participated in any way in the May 18 sale, denied that the events showing his participation had occurred.

The case required the jury to believe Johnson or to believe Spigener. As we see it, the conversation between Johnson and Spigener on May 11, the use of Johnson's residence as the focus for negotiations and as a base of operations, the use of Johnson's automobiles as an integral part of the mechanics of the possession and sale, the relation between Johnson and O'Neal, Johnson's part in leading the agents to the pick-up point where the whiskey was delivered, and the record as a whole constitute substantial evidence to support the jury's belief in Spigener and its verdict against Johnson. *Hargrove*

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v. United States, 5 Cir., 1944, 139 F.2d 1014.

II.

Appellants contend that the district court erred in denying their motion for acquittal on the conspiracy charge. The indictment alleged one continuous conspiracy from April 1, 1955 to July 27, 1956, but the proof showed two separate and unrelated conspiracies.

Since the defendants were acquitted on the conspiracy charge, there is no merit to the contention. The admissible evidence on the substantive count was sufficient to warrant the conviction, regardless of the evidence introduced to show the alleged conspiracy. In the circumstances of this case, the trial judge's denial of the motion for acquittal and refusal to instruct the jury to disregard any prejudicial testimony introduced to show conspiracy were not reversible error.

III.

Appellants contend that the trial judge in instructing the jury erred in limiting his charge on entrapment to the conspiracy case. There is no merit to this contention. As we read the instructions on entrapment, they are fair, legally correct, and broad enough to apply to the substantive case as well as to the conspiracy case. The issue of entrapment was not raised in the trial of the substantive case. As far as the record shows, however, the district court refused the defendant's requested

charge on entrapment only because it was covered in the general charges to the extent that it was applicable.[1]

IV.

We find no abuse of discretion, no prejudicial error, by the district court in refusing to grant Johnson's motion for severance. The district judge was careful to admonish the jury that a statement by Branch that Johnson wanted him to receive the payment for the whiskey and another statement that Branch had worked for Johnson for three years were not to be considered as evidence of Johnson's guilt. Any statement by O'Neal, of course, would have been admissible against O'Neal in the substantive case, even if a severance had been granted. Considering the record as a whole, the nuances and the small things that might mount up in the jury's mind, we find no unfair climate produced by the lack of severance.

V.

We have weighed and found wanting appellant's contentions that the court below erred in refusing to give certain requested charges.

Judgment must be

AFFIRMED.

1 In a colloquy with the trial judge defense counsel stated that he agreed that there was no question of entrapment as to the substantive case, because the defendants had denied that the incidents alleged by the government had ever occurred.

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ORDER DENYING REHEARING

Extract from the Minutes of January 14, 1960.

WILLIAM M. JOHNSON and WALTER O'NEAL,

No. 17655. versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

WILLIAM M. JOHNSON and WALTER O'NEAL,

Appellants,

No. 17655. v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February , 1960)

ON PETITION FOR REHEARING FILED OUT OF TIME

Before HUTCHESON, TUTTLE, and WISDOM, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled cause be, and the same is hereby

DENIED

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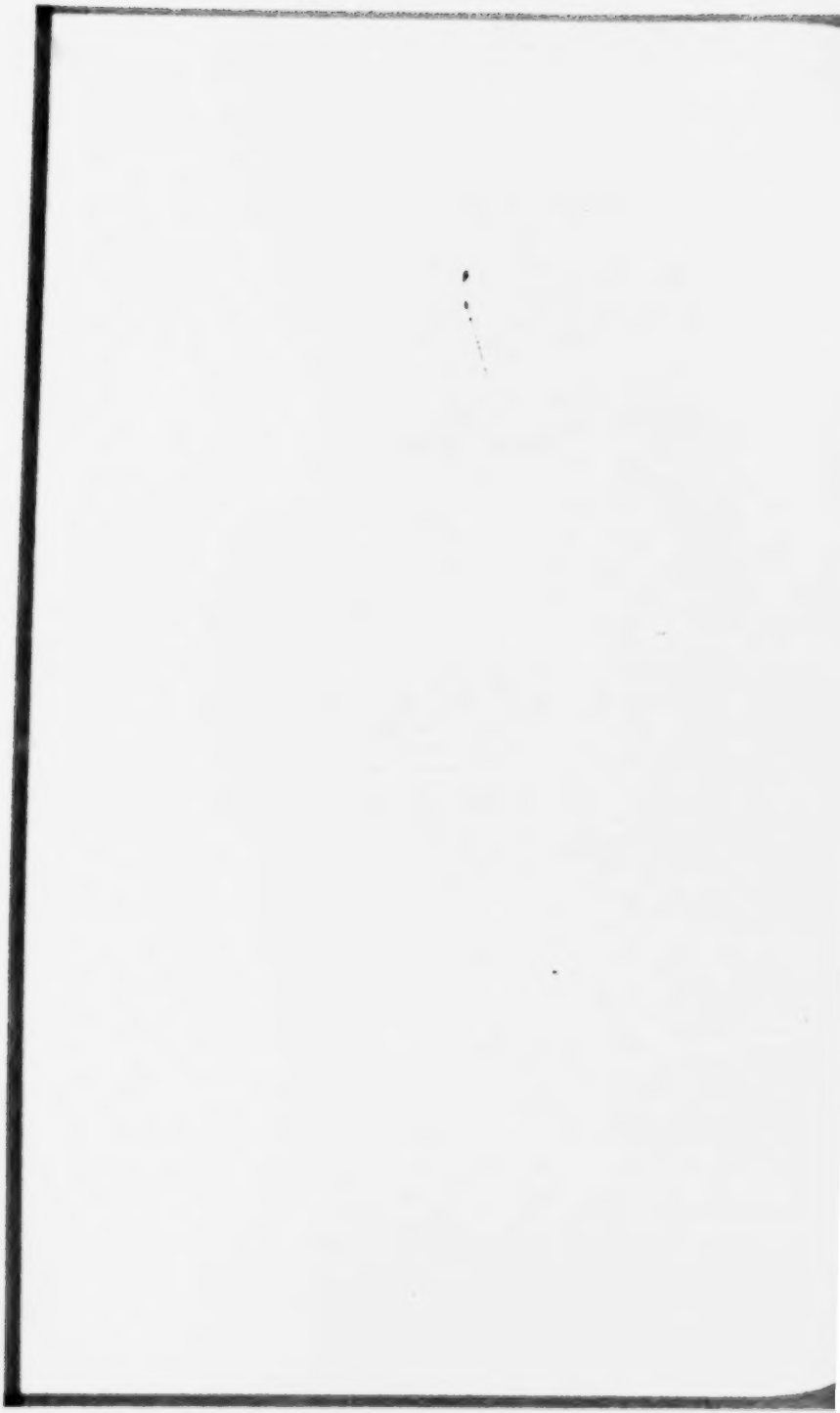
CITATION

Case:

Henderson v. *United States*, 237 F. 2d 169 6



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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 759

WILLIAM M. JOHNSON AND WALTER O'NEAL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 273 F. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered December 14, 1959. A petition for rehearing was denied on January 14, 1960, and a second petition for rehearing was denied February 24, 1960. The petition for a writ of certiorari was filed March 3, 1960.

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.
2. Whether the charge on entrapment covered the count on which the petitioners were convicted.
3. Whether the submission to the jury of a conspiracy count, on which the petitioners were acquitted, resulted in prejudice on the substantive count.

STATEMENT

In the United States District Court for the Southern District of Florida, the petitioners were convicted on a charge of possessing, on May 18, 1955, liquor to which proper revenue stamps had not been affixed. Mr. Johnson was sentenced to imprisonment for three years and Mr. O'Neal for nine months (R. 258-260). On appeal the judgment was affirmed.

The trial was consolidated with another indictment charging a conspiracy among the petitioners and one Robert Branch to possess, remove and conceal non-tax paid liquor from April 1, 1955, to May 18, 1955. The evidence showed that on May 11, 1955, a government investigator who was with an informer, Mr. Richardson, spoke to petitioner Johnson about buying 25 jugs of whiskey. Mr. Johnson said he had only 20 hidden near Baldwin (R. 20). That afternoon the agent and informer went to Mr. Johnson's house. After a conversation between the informer and Mr. Johnson, Branch led the agent and informer to a spot about five miles away, then took their car and returned it with 20 5-gallons jugs of whiskey which did not have the required stamps (R. 22-26). The agents gave Mr. Branch $200 (R. 25).

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On May 18, after the informer made a call, the agent, the informer and a state officer went to Mr. Johnson's house (R. 27). Mr. Johnson arrived later, and then Mr. O'Neal (R. 27-28). Mr. Johnson said Mr. O'Neal would load the agent's car (R. 28). Later, Mr. Johnson drove the agent to a spot some distance away and left (R. 30-31). Mr. O'Neal arrived with the agent's car loaded with 25 jugs of non-tax-paid whiskey (R. 31).

Mr. Johnson, in his own behalf, testified that, on May 11, the informer Richardson introduced him to the man who proved to be the government agent at a restaurant, and that Mr. Richardson said he was looking for a load of liquor to pay the bills of his mother who was in the hospital. Mr. Johnson said he denied being in the liquor business (R. 97-102). Later Mr. Richardson and the agent came to Mr. Johnson's home (R. 114). He said that, when Mr. Branch came in while Mr. Richardson and the agent were there, he told Mr. Branch that Mr. Richardson wanted liquor (R. 116).[1] Mr. Johnson denied seeing Mr. Richardson or the agent on May 18 (R. 120) and denied seeing Mr. O'Neal on that day (R. 121). Mr. O'Neal also denied delivering liquor on May 18 (R. 175).

The trial court was of the view that there was no showing of agreement between Mr. Branch and Mr.

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[1] Mr. Branch testified that he acted on his own in selling the liquor on May 11 and kept the money himself (R. 141-143). He also stated that he was in jail on May 18, 1955 (R. 144).

O'Neal, and directed the government to elect whether it would proceed against one or the other on the conspiracy count, the charge to be confined to the overt acts in which the one chosen had participated (R. 216-217). The government elected to proceed against Mr. Branch for the events on May 11. The case was submitted to the jury against Mr. Branch and Mr. Johnson on the conspiracy count limited to May 11 (R. 228, 230-231, 237-238). The jury acquitted on conspiracy, but convicted petitioners Johnson and O'Neal on the substantive count, based on the events of May 18 (R. 255).

ARGUMENT

1. As the court below ruled, the evidence amply supports the verdict. As to the events of May 18, the issue was one of credibility as between the agent who testified to the purchase and the testimony of petitioners denying that they ever saw the agents on that day. That issue was for the jury to resolve.

2. The argument that the judge should not have submitted the conspiracy count to the jury is of no significance since petitioner Johnson was acquitted together with Mr. Branch on that charge, and the court itself dismissed the charge as to petitioner O'Neal. Testimony as to prior dealings on May 11 would have been admissible regardless of the conspiracy count, in order to explain the events of May 18.

3. On the issue of entrapment, the court did say out of the jury's presence that it saw no reason to charge on entrapment as to the events of May 18

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since the defendants denied that the events ever took place (R. 206). The petitioner's counsel stated that he agreed with the court (R. 206). The charge as given, was not, however, so limited. The court did say that, as to the events of May 11, Mr. Johnson asserted "that he was entrapped into whatever participation he may have had with those matters" (R. 246), but this was merely an accurate summary of the testimony given by Mr. Johnson, who claimed that, at this one time, he told Mr. Branch that Mr. Richardson wanted liquor. The court later said that if the jury "should find from the evidence that, before anything at all occurred respecting the *alleged offenses* involved in this case, the accused Johnson was ready and willing to commit *crimes such as those charged in the indictment* whenever opportunity was offered the the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment (R. 247)." (Emphasis added.) Hence, although the court, under the evidence, necessarily stressed the events of May 11, we do not think its charge on entrapment would be understood as applying to that offense alone.

Even if the instructions are read as limited to the events of May 11, we do not believe that there was error under the facts of this case. While normally, an accused may deny committing an act and also assert that, if he did it, he was entrapped, the situation here on entrapment was different from the usual case. Petitioner O'Neal offered no evidence on entrapment at all. Petitioner Johnson's defense of entrapment was that he merely informed Mr. Branch

of the request of Mr. Richardson on May 11. In other words it was a defense of entrapment as to one limited situation, and not a claim that he had been entrapped generally into the liquor business. Under these circumstances, the trial judge could properly conclude that, as to the substantive offense alleged to have occurred on May 18, no evidence as to entrapment had been offered. See *Henderson* v. *United States*, 237 F. 2d 169, 173 (C.A. 5), where the court, in holding that inconsistent defenses are available, recognized that this may not apply in particular situations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1960

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